



## CAN PART III OF THE CONSTITUTION BE EXTENDED TO PRIVATE ENTITIES?

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### Abstract

*Fundamental Rights are basic human rights that are guaranteed to all citizens with the vision to promote a dignified life to all individuals. As per the Constitution of India however, the breach of these fundamental rights can only be claimed against the State and hence private entities and individuals are kept outside the confines of the fundamental rights provisions. This becomes all the more problematic in recent times due to the rampant increase of globalization and privatization which gives great importance to the role played by private bodies in the development of the economy. This paper aims to identify who are the parties that fundamental rights can extend to within India by chronologically analyzing the views that have been displayed by the Judiciary over the years and possibly to see if there remains any scope for improvement in the definition of who can a breach of fundamental rights be claimed against.*

### 1. Introduction

Part III of the Constitution of India grants Fundamental Rights to all its citizens. Read together with Part IV and Part IV- A, that is Directive Principles of State Policy and

Fundamental Duties, it aids in attaining the goals of justice, liberty, equality and fraternity that have been put forth by the Preamble. These fundamental rights can be construed as negative obligations upon the State to not interfere with the liberty of individuals. <sup>1</sup>Since this obligation lies upon the State to not interfere with the liberty of individuals, it is generally assumed the rights guaranteed under Part III are to be enforced and can be claimed against state action.

The constitution bestows immense authoritative power and dominance to the State. Thus, it becomes imperative to find a way to ensure that these powers are not misused and one of the ways by which this is ensured is by guaranteeing fundamental rights. Fundamental rights are guaranteed to the citizens firstly, as a protection against the arbitrary actions of the state and not against private individual secondly, private action can be taken care of by the ordinary law of the land. <sup>2</sup>

In recent times however, a paradigm shift has taken place in the role of the state with the emergence of private participation in the socio- welfare sectors of the economy. The concept of statehood has undergone a considerable shift due to globalization and so has the relationship between individual rights and governmental power. <sup>3</sup>Owing to this changing scenario, there is a serious need to redefine “state” under article 12 and widen its interpretation to make room for a horizontal application of FR’s in India and include private entities within its ambit.

<sup>1</sup> Mahendra Pal Singh, *V.N. Shukla’s Constitution of India*, 13th Edition 2017

<sup>2</sup> Sanu Rani Paul, *Need for Horizontal Application of Fundamental Rights in India with reference to state*

*action doctrine in the context of Globalization*, Christ University Law Journal, 2,1(2013)

<sup>3</sup> *Ibid.*



## 2. Horizontal versus Vertical Application of Rights

Before entering into a discussion of against whom fundamental rights can accrue and against whom they cannot it is imperative to first gather an understanding of how these rights apply within the framework of our constitution and in our country.

Most rights in most constitutions, whether civil and political rights or socio-economic rights are applied vertically with an exception of a few that are horizontal in application for example under the writ of *tutela* in Columbia or constitutional tort actions in Ireland<sup>4</sup> where the concept of horizontal application was introduced for the first time. There the court adopted an approach where it could start action against private individuals under the principle of *sui generis* (of its own kind) by deeming that wrong as a constitutional tort and start enforcing rights against that private entity.<sup>5</sup>

In the Indian context as well, one of the most important questions that arose before the Supreme Court in the long awaited judgement regarding the constitutionality of the Right of Children to Free and Compulsory Education Act, 2009 (RTE Act) which mandated all private schools to compulsorily give admission to children from the disadvantaged sections of society adding up to 25% of their total strength was that of the horizontal application of the fundamental right to education.<sup>6</sup>

<sup>4</sup> Oxford University Press, *The Oxford Handbook of the Indian Constitution*, (first published 2016, South Asia Edition)

<sup>5</sup> Dr. Dilip Kumar Upadhyay, *Horizontal Application of Fundamental Rights: Issues and Concerns*, Madhav University (2018),

On the simplest level, the most basic distinction between rights with a vertical effect and rights with a horizontal effect is that rights with a vertical effect apply only against the government whereas rights with a horizontal effect apply against private actors as well. Within rights which carry a horizontal effect, a further distinction exists between their direct and indirect horizontal application. Under direct horizontal effect, individuals can simply sue their fellow citizens for violating their fundamental rights whereas under rights with an indirect horizontal effect, although constitutional rights do not directly impose regulate and impose a duty on private actors, they may nonetheless impact them indirectly. One of the ways in which this occurs is by the affirmation of an active constitutional duty on the government to protect individuals from certain actions by other private actors.

The Supreme Court has consistently adhered to the general position that fundamental rights have a vertical application and do not apply against private individuals<sup>7</sup> however there has been scope for this stance to drift on multiple occasions where the courts have read into what comprises the “State” and hence against whom do these fundamental rights apply.

## 3. Who is the “State”?

### 3.1 Constitutional Interpretation of the State

<http://www.madhavuniversity.edu.in/horizontal-application.html>

<sup>6</sup> Jayna Kothari, *Horizontal Application of Right to Education in India*, Oxford Human Rights Hub (13<sup>th</sup> Sept 2013), <http://ohrh.law.ox.ac.uk/horizontal-application-of-the-right-to-education-in-india/>

<sup>7</sup> see Supra note 4



In India, it is generally assumed that the fundamental rights guaranteed under Part III of the constitution can be availed only actions of the state.<sup>8</sup> A comprehensive reading of the articles under this part reveal the same. Article 14 for instance states that “*the State* shall not deny to any person equality before the law ...”. Article 15 prohibits discrimination on grounds of religion, race, caste, sex or place of birth and states that *the State* shall not discriminate against any citizen on the above-mentioned grounds. Similarly, article 16 assures equality of opportunity in matters of public employment and offices under *the State*.

Under Part III, article 12 of the Constitution of India defines the state. As per that, “the state includes the Government and Parliament of India and the Government and Legislature of each of the States and all local or other authorities...” The usage of the term “includes” in the definition indicates that it is not exhaustive but inclusive in nature and there is always scope to incorporate more elements within the purview of this definition. The employment of an inclusive definition makes it evident that the Constituent Assembly did not wish to fossilize the list of actors against whom fundamental rights could be claimed.<sup>9</sup>

A lot of discourse around the scope of fundamental rights has been prevalent amongst the drafters of the constitution and can be seen in the constituent assembly debates. Dr. BR Ambedkar clarified that the purpose of Part III was not only to bind the Central and State Governments but also

every district local board, municipality, panchayat, taluk board, and every other authority created by law and vested with the authority to make laws, rules or by-laws.<sup>10</sup> According to Naziruddin Ahmad, the State under article 12 means a wonderful series of things. He has on several occasions critiqued the overly passionate use of the word “state” by the drafting committee which has led to a serious lack of clarity regarding the subject of what the State really comprises of. The State is ideally supposed to be a well- defined body of individuals; however, he said that if we allow the word 'State' to be used for all sorts of purposes, the very purpose of this well-known constitutional expression would be lost.<sup>11</sup> He was of the opinion that the eager use of this term was perhaps the consequence of an attempt by the drafting committee to come up with a word that would be catchy and sonorous.

The constituent assembly debates give us a very limited understanding of what the State was intended to be and hardly dwell on what is meant by the term “other authorities” under article 12. The courts however, have encountered the question of horizontally interpreting the extent of Part III’s applicability at various junctures and provide a fair bit of help to comprehend what is meant by “other authorities”.

### 3.2 Judicial Interpretations of what constitutes the “State”

In the 1952 case *P.D Shamdasani v. Central bank of India*, the petitioner sought enforcement of his rights under article 19 (1) (f) and article 31. This was one of the earliest

<sup>8</sup> see Supra note 4

<sup>9</sup> see Supra note 4

<sup>10</sup> Constituent Assembly Debates, vol 7, (Lok Sabha Secretariat), 25 November, 1948

<sup>11</sup> Constituent Assembly Debates, vol 7, (Lok Sabha Secretariat), 5 November, 1948



decisions of the Supreme Court where the court held that “the language and structure of Article 19 and its setting in Part III of the Constitution clearly show that the article was intended to protect those freedoms against the State action.” The court also clarified that “violations of rights of property by individuals is not within the purview of the Article.”<sup>12</sup>

In another case, *State of West Bengal v. Subodh Gopal Bose*, 1954, Chief Justice Patanjali Sastri clearly stated that “the whole object of Part III of the Constitution is to provide protection for the freedoms and rights mentioned therein against arbitrary invasion by the State”.<sup>13</sup> The Madras High Court in 1954 itself reflected further on this in the case *University of Madras v. Shantha Bai*<sup>14</sup> and concluded that “other authorities’ would only include those exercising governmental functions when construed ejusdem generis.” Shortly after this, in the 1956 case *Vidya Verma v. Shiv Narain Verma*<sup>15</sup>, a writ was refused under article 32 which grants constitutional remedies to citizens whose rights have been infringed because it was against a private person.

In the 1967 case of *Electricity Board, Rajasthan SEB v. Mohan Lal*<sup>16</sup>, the Supreme Court held that the doctrine of ejusdem generis is inapplicable to the interpretation of the expression “other authorities” since ejusdem generis requires a common category or genus of bodies through which this rule can be applied and no such common category

exists under article 12. The court held that “other authorities would include all authorities created by the Constitution or statute on whom powers are conferred by law.” The statutory test was introduced by the courts in this case to classify a body as a state.

Later in *Sabyajit Tewary v. Union of India* in 1975, the court held that the Council of Scientific and Industrial Research (CSIR) would not fall within the purview of a State simply because in its legal form, it was a society registered under the Societies Registration Act and thus lacked statutory character.<sup>17</sup>

In the same year, in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, the court dealt with the question of whether statutory bodies such as ONGC and LIC etc. came within the definition of State. Justice Matthew brought in the ‘Test of Instrumentality’ in this case and upheld the principle that “if any entity is acting as a means or instrument of a state, then it satisfies the test for ‘authorities’ under article 12.”<sup>18</sup>

This test was reiterated in *Ramana Dayaram Shetty v. International Airport Authority of India*, 1979 where the court categorically held that agencies and instruments of the State would be bound to a fundamental – rights based review of their actions to determine whether they are a State or not. Justice Bhagwati pointed out that if they government is subject to certain limitations in

<sup>12</sup> *P.D Shamdasani v. Central bank of India*, 1952 AIR 59

<sup>13</sup> *State of West Bengal v. Subodh Gopal Bose*, 1954 AIR 92

<sup>14</sup> *University of Madras v. Shantha Bai*, AIR 1954 Mad 67

<sup>15</sup> *Vidya Verma v. Shiv Narain Verma*, 1956 AIR 108

<sup>16</sup> *Electricity Board, Rajasthan SEB v. Mohan Lal*, 1967 AIR 1857

<sup>17</sup> *Sabyajit Tewary v. Union of India*, 1975 AIR 1329

<sup>18</sup> *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi*, AIR 1975 SC 1331



the eyes of constitutional and public law then the government acting through an instrument or agency or corporation must also be equally subject to the same limitations.<sup>19</sup> Without being exhaustive, he discussed at length various factors which are relevant to determining whether a body is an instrument of the State and these factors were later summarized by him in the case *Ajay Hasia v. Khalid Mujib Sehravardi*, 1981.

In this case the court introduced the “juristic veil” principle and expanded the ambit of article 12 to say that any entity can be classified as State if the society which is formed resembles the functions as that of a State, that is, public, administrative and financial functions. These principles were applied disjunctively of one another. The court enumerated a few factors to help determine the functionality of these bodies such as what percent of financial assistance is the corporation receiving from the State, whether the entire share capital of the corporation is held by the Government or to what extent is there the existence of a deep and pervasive control of the State in the functioning of the corporation.<sup>20</sup> *Smt. Rani Paul* has criticized this test in her paper in context of the current scenario suggesting that a straight -jacket formula as the one applied in *Ajay Hasia* for the purpose of ascertaining amenability of these bodies under Article 12 will lead to miscarriage of justice. Public functions test must be applied in the cases of violation of fundamental rights by private bodies, which do not fall under Article 12.<sup>21</sup>

<sup>19</sup> *Ramana Dayaram Shetty v. International Airport Authority of India*, 1979 AIR 1628

<sup>20</sup> *Ajay Hasia v. Khalid Mujib Sehravardi*, 1981 AIR 487

Post this, in the landmark case of 1987, *MC Mehta v. Union of India*, the court advanced strong arguments for even including non-governmental companies within the meaning of State<sup>22</sup>. Similarly, in another landmark case *Vishaka v. State of Rajasthan*, 1997, the court held that the guidelines with respect to prevention of sexual harassment in workplaces will be applied across the board in all places of employment whether public or private.<sup>23</sup>

In 2002, the Supreme Court expressly overruled its judgement delivered in *Sabyajit Tewary* by the case *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology* where they stated that “the question in each case would be whether in light of the cumulative facts as established, the body is financially, functionally and administratively dominated by or under the control of the Government.” It also held that all these aspects need to exist together and must be applied conjunctively<sup>24</sup> as opposed to what was laid down in the *Ajay Hasia* case.

Despite this, again in 2005, in *Zee Telefilms Ltd v. Union of India*, the court by a majority of 3:2 refused to admit the Board of Control for Cricket in India (BCCI), a society registered under the Tamil Nadu Societies Registration Act within the definition of a State. The BCCI contended that it should be held not be held as a “state” under article 12 because if so then several other sporting and cultural bodies would also get caught within this net and the judiciary would be severely

<sup>21</sup> see *Supra* note 2

<sup>22</sup> *MC Mehta v. Union of India*, 1987 AIR 1086

<sup>23</sup> *Vishaka v. State of Rajasthan*, 1997 AIR 3011

<sup>24</sup> *Pradeep Kumar Biswas v. Indian Institute of Chemical Biology*, (2002) 5 SCC 111



burdened with writ petitions pertaining to disputes regarding them. The majority concurred and ruled in favour of BCCI.<sup>25</sup>

Finally, in 2013 the court held in the case of *S Subramanian Balaji v. State of Tamil Nadu* that even political parties are not covered within the “State” and hence no writ can be issued against them.<sup>26</sup>

#### 4. Conclusion

As citizens of this country, we all have willingly subjected ourselves to the provisions of our Constitution. We have entered into a *social contract* or contract of submissions of sorts with our governmental bodies which defines the terms of which society is to be governed and concerns the legitimacy of authority of the State over the individuals.<sup>27</sup> This theory argues that in order to live in a political society and have basic civil and political rights accrued to us, we have to give up certain rights. These rights primarily include the ones that interfere with the liberties of other individuals co-existing in the society and create scope for inharmonious living. These individuals are private in themselves and in the process of affirming their basic human rights also ensure that they do not violate the basic human rights of other private individuals. If this is way in which our societies have been organized, then how can one accept that individuals cannot hold other individuals liable before the eyes of law for infringing their basic fundamental rights?

The simple and straight- forward answer to the question whether Part III of the Indian Constitution that covers fundamental rights

of all citizens can be extended to private entities or not is that there isn’t any. This question cannot be resolved in a typical yes or no manner primarily due to the fact that there is no source, neither case law nor statute that explicitly defines the effectual relationship between fundamental rights and private entities.

However, in an era of globalization and privatization, and with private entities making unreasonable interferences in the lives of people by way of their operations, it is of utmost importance that private entities are made subject to the rights and liabilities protected under Part III.

This change of trend is also evident in the variance of the court’s interpretation with regard to bringing private entities within the scope of the State under article 12. Up until 1960s, majority of the decisions reveal a desperate attempt by courts to uphold the original view that private entities could not be the State and hence do not fall under the purview of Part III. However, as time progressed and privatization began to emerge within the framework of the economy, the courts slowly began to reflect on the need of expanding the criteria for determining what is the state and accordingly what can be subjected to the provisions of fundamental rights.

Despite this, there is an urgent need to concretely enlarge the definition of State and deviate from the traditionally upheld notions of socialism and accept that private entities need to be equally exposed to Part III.

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<sup>25</sup> *Zee Telefilms v. Union of India*, (2005) 4 SCC 649

<sup>26</sup> *S Subramaniam Balaji v. Government of Tamil Nadu*, (2013) 9 SCC 659

<sup>27</sup> J.W. Gough, *The Social Contract*, (Oxford Clarendon Press 1936)